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The Court Forces Counsel to Remain on the Record for Child Protection Trial

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I am accustomed to advocating for my clients, however, I am unaccustomed to being the focus of the Judge's comments. The idea of being the focus of the Judge's comments is somewhat uncomfortable. With that said, there are parts of Justice Spence's recent decision in *Jewish Family and Child Service of*

Greater Toronto v. Z (J), where the Court denied my request to be removed as solicitor of record, which do merit comment.

This decision highlights a number of problems in the Family Courts generally and especially in Child Protection litigation. I believe that Philip Epstein is correct when he recently commented that this case outlines the current problems with access to justice for middle class litigants but, with respect, the problems highlighted in this case go much deeper than that single issue.

As much as I appreciate the Court's recognition that as lawyers in Child Protection matters we are the "unsung heroes of the legal profession," it also feels like being offered a treat before you are thrown off a cliff. We all deserve to be paid for our labour, so to force any lawyer to proceed on a matter where there is a real prospect of not being paid for our time, work and effort is simply unfair. The fact that in our case there is no other solution that would allow the client full access to legal representation which she clearly needs is very concerning, but what I truly fail to understand is why counsel needs to bear the full burden of the client's right to access justice.

There are a number of problems in this matter that directly flow from the fact that Child Protection litigation puts the parents at odds against a Children's Aid Society and because we are frequently dealing with the prospect that a parent may lose or have their relationship with their children significantly limited. With that said, the stakes for parents are the highest in Child Protection litigation due to the increased risk of losing their children. Further inflating the problem is the fact that this litigation places the individual against the State and, as such, the parents as litigants are given far more benefit of doubt

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and freeway. In what and how they argue their case than in other areas of Family Law.

Frequently, the Courts decline to order costs against the parents, even when they have been particularly unsuccessful or failed to follow interim orders. The Court's concern is to not stifle the parents' right to vigorously defend themselves. However, if the Court refuses to set reasonable boundaries or cost consequences, then we run the risk of emboldening the unreasonable litigant, even when it is a parent.

The risk of this is not just to allow a single case to unreasonably absorb more than its fair share of Court time and resources, but also to allow the emboldened litigant to use and abuse the resources of the Children's Aid Agency and the Office of the Children's Lawyer. Nonetheless, the largest risk is to the other parent in situations where the parents have or may have competing interests. Where the parents in a Child Protection matter have different viewpoints and positions, then the emboldened litigant not only absorbs the time and resources of the judicial system, the Children's Aid Society and the Office of the Children's Lawyer but also the other parent. For the other parent, it can seem like standing on the railway tracks waiting to be run over by either the embolden parent or the Children's Aid Society, thus placing that parent in a real catch 22.

The problem becomes further magnified when one parent is part of the working middle class and through careful budgeting and management, the client was able to pay their ongoing legal fees for numerous motions, a care and custody hearing, conferences and questionings and, although they were successful in most steps, due to the nature of the litigation they received no cost rewards. Then, on the long march towards trial, after numerous discussions the client comes to the conclusion that they cannot afford a trial retainer, which put us before Justice Spence with my request to be removed as solicitor of record being denied.

All of this has created a situation where we are now part way through a Child Protection trial that seems to have little prospect of ending in the near future. A trial where, due to our overarching concern to not prejudice or interfere with one parent's ability to litigate the issues, we have litigation that no middle class earner can ever afford. Not only have we made access to justice difficult for the middle class litigant but we have now forced them to proceed with counsel, accumulating huge legal costs with more to follow, with little prospect of the litigant being able to pay this debt in the foreseeable future.

It may not have been foreseeable when Justice Spence ordered me to remain on the record for my client for a 5-week trial, but as the litigation has continued, the hardship to the client of funding their ongoing Child Protection litigation is mind-numbing and clearly overwhelming, and with the costs to counsel who has little chance of being paid continuing to mount, essentially financially crippling all involved.

The Court's noble desire to not prejudice, or force, or influence how parents in Child

Protection matters pursue litigation that is so fundamentally important to them, must be weighed against the real prejudice that these decisions result in for the other parent. To not limit the process, the filings, the paperwork and the costs is running the real risk of creating a run away train where one party can simply overwhelm everyone else. The Courts, as well as counsel must take action and responsibility in taming this problem; justice that destroys the litigants in the process isn't justice at all.

Sheri Hirschberg has been practicing law for over 20 years and has been running her own family law practice for the past 18 years. Currently Sheri is a sole practitioner who practices throughout the GTA and whose practice specializes in all aspects of family law including; domestic contracts, divorce, custody and access, property issues, child and spousal support and child protection.

About the Author



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